

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-6186

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-6186

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P/S

ROBERT V. RAFTER,

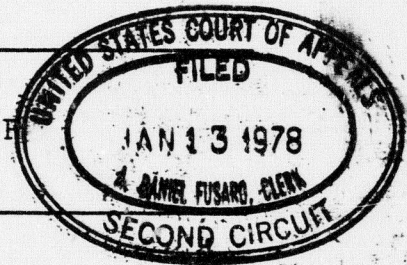
Plaintiff - Appellant,

- against -

FEDERAL BUREAU OF INVESTIGATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE,

Defendant - Appellee.

PLAINTIFF-APPELLANT'S BRIEF



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UNITED STATES COURT OF APPEALS
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ROBERT V. RAFTER,

Plaintiff-Appellant,

- against -

FEDERAL BUREAU OF INVESTIGATION
OF THE UNITED STATES DEPARTMENT
OF JUSTICE,

Defendant-Appellee.

APPELLANT'S BRIEF

Statement of the Case

This is an action pursuant to the Freedom of Information-Privacy Act, 5 USC 552, 552a et seq., for (1) records, (2) amendment of records, (3) damages and (4) statutory costs and legal fees. Result: some records were produced and then the court entered summary judgment in favor of the FBI dismissing the complaint and denying all depositions.

This appeal is from the judgment of dismissal entered 19 August 1977 and from the order denying depositions entered 22 August 1977.

Jurisdiction is invoked under 28 USC 1291.

Statement of Facts

Plaintiff requested access to N.Y. records concerning him by letter addressed to the New York FBI 23 August 1976, see (letter at 36a). Access locally was denied by the FBI 1 October 1976 (letter at 41a). No records were produced, and plaintiff filed the complaint on 8 March 1977 (docket 1a) alleging that there were records at the New York office (complaint 5a) and that they had been refused. Plaintiff moved for summary judgment and, when this was not acted upon, served notices to take depositions (7a, 14a, 15a). The answer of the FBI denied that New York records existed (answer 12a). Defendant then stayed all depositions (Motion for protective order 16a) and moved for summary judgment and for dismissal of the complaint (Motion to Dismiss 19a) for failure to exhaust administrative remedies, citing 552a(f)(4) as authority (Hibsher Reply Affidavit 54a). An oral argument was heard 13 June 1977, and Washington records were produced with covering letter dated 14 June 1977 (Letter 87a). Plaintiff moved to compel depositions (Rule 26c Motion 56a). This was denied, and summary judgment was entered in favor of the FBI dismissing the complaint (Judgment 128a). Plaintiff's motion to reargue the denial of depositions was also denied (Rule 9m Motion 129a).

1. A copy of the transcript of the oral argument is in Mr. Hibsher's possession.

Questions Presented

- (1) Whether granting summary judgment dismissing the complaint is in violation of the due process clause of the fifth amendment and in violation of 5 USC 552a.
- (2) Whether denial of discovery by deposition is a denial of due process and an improvident exercise of discretion.
- (3) Whether regulations alleged to be controlling are overbroad and unconstitutional in their content and application.

Summary of Argument

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The underlying theme of the two acts is discovery of records. Refusal to depose the N.Y. FBI and others runs counter to the basic purpose of the legislation.

Also competing for attention is Mr. Hibsher's PA defense of failure to exhaust administrative remedies, (Reply Affidavit 54a), citing section 552a(f)(4) as authority for the agency review regulation, 28 CFR 16.47.

-
2. 5 USC 552, Freedom of Information Act (FOIA), effective 10 December 1974, as amended.
5 USC 552a, Privacy Act (PA), effective 27 September 1975.

A reading of 552a(f)(4) reveals no basis for agency review procedures with respect to a refusal to produce records. Section 552a(f)(4) is concerned with rights to amend records and has nothing whatsoever to do with production of records.

So the defense is a sham. On the basis of this sham depositions were stayed and then denied (110a, 129a) and the action dismissed (128a).

It follows that the granting of summary judgment dismissing the complaint is in violation of 5 USC 552a and a denial of due process. It follows also that the denial of plaintiff's Rule 26(c) motion to depose the N.Y. FBI and others (Motion 56a) is an improvident exercise of discretion and the stay of depositions a denial of due process — a denial of equal protection of the laws so flagrant as to be a denial of due process guaranteed by the fifth amendment.

The regulations providing for agency review are set forth at 28 CFR 16.47, and they have no source in the statute, and, for that matter, no provenance in English law. So, there is nothing intrinsically wrong with the regulations so long as they remain merely optional, providing parallel procedures along with the act for the production of records, not preclusive, nor mutually exclusive and not mandatory. But when they are

applied as an indispensable prerequisite to suit in this court, as has been done in this case by the Honorable Marvin E. Frankel and by Mr. Hihser (Opinion 110a, Reply Affidavit 54a), they become violative of the due process clause and unconstitutional in their application, absent all statutory authority. As applied by the court they are overbroad and have the effect of obliterating the civil remedies section of the act 552a(g)(1) and making the act dependent upon executive agency procedures, contrary to the express statutory language of the act.

So also Mr. Levi's regulation 28 CFR 16.57(c)(1), requiring local N.Y. records to be processed out of Washington (FBI Letter 41a), has the effect of eliminating suit in the Southern District. The act provides for suit where the records are located, 552a(g)(5), and, of course, if the FBI transfers the records to Washington, then the records are no longer located in N.Y. The act also says that an individual and one other may visit the agency and review and copy the record, 552a(d)(1); it is one thing to have visitations in N.Y. and quite another in Washington. So, here again the regulation is broader than the statutory language and eliminates one area of venue in violation of the fifth amendment, with concomitant chilling effect upon private access requests.

POINT I

DEPOSITIONS ARE THE CUSTOMARY METHOD OF RESOLVING ISSUES OF FACT AND FORM AN INTEGRAL PART OF PLAINTIFF'S CASE.

There are no bright lines drawn about the civil remedies section of the act, 552a(g)(1).

Judge Medina has held that agents of the Federal Bureau of Narcotics and other police officers such as agents of the FBI have no immunity to protect them from damage suits, but it is a valid defense to allege and prove that the agent acted in good faith, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 US 388 (1971), on remand 456 F.2d 1339 (1972).

This is an action for local records, records located in N.Y. at 69th Street (Complaint 5a; Pl. 9g Statement 8a; Notice of Deposition 14a). The FBI denies it has N.Y. records, see paragraph 6 of the Answer at App. 12a. Plaintiff alleges there are records at 69th Street, see paragraph 7 of the Complaint at App. 5a. So we have a clear issue of fact: the extent and existence of N.Y. records. Other issues of fact include intentional and willful acts under 552a(g)(4). How else will the court (in this case the jury) make a finding of intentional or willful conduct if plaintiff is denied the right to depose.

Other issues of fact include the misrepresentation³ mentioned at section 552a(g)(5) and concealment at paragraph 9 of the Complaint at App. 5a.

Again, amendment procedures to correct inaccuracies require documentation by the individual seeking to amend, 28 CFR 16.48. What better documentation than⁴ sworn testimony in deposition form. Further issues of fact are present in proving the effect of the superficial investigation in support of the declination by U.S. Attorney Stewart Jones, section 552a(g)(1)(C).

A fair trial requires the right to depose, and denial of a fair trial is a denial of due process, In Re Murchison, 349 US 133, 75 S.Ct. 623, 99 L.ed. 942; Murphy v. Waterfront Commission, 378 US 52.

James Madison has said:

A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both.

3. Opinion of Judge Swan at 134 F2d 875 (CA2d 1943).

4. For example, the deposition excerpts at App. 118a to 124a.

POINT II

DISMISSAL FOR FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES VIOLATES THE STATUTE AND FIFTH AMENDMENT GUARANTEES OF DUE PROCESS.

The dismissal memorandum (110a) relies on Mr. Hibsher's exhaustion defense, and this defense, according to Mr. Hibsher (Reply Affidavit 53a), has its source in section 552a(f)(4), but, as we have seen, section 552a(f)(4) is concerned with amendment procedures only and has no application to refusals of access to records. It would seem that the court has been misled by the defense proffered. Mr. Hibsher originally was on solid ground when he advanced this defense in his affidavit of 13 May 1977 (17a), referring to specific statutory language at section 552(a) requiring agency review prior to suit and specifically defining exhaustion of remedies at section 552(a)(6)(C). But section 552(a) is the Freedom of Information Act not to be confused with section 552a, the Privacy Act. So, Mr. Hibsher made a quick switch from 552(a) to 552a in his gratuitous reply affidavit (53a), but this does not lessen the sham, and it has apparently misled the court.

POINT III

THE REGULATIONS ALLEGED TO BE CONTROLLING ARE
OVERBROAD AND UNCONSTITUTIONAL IN THEIR CONTENT
AND APPLICATION.

Plaintiff's letter request in 1976 was directed at the New York FBI (Letters 36a, 38a, 40a). Mr. La Prade relegated the matter to Washington, citing 28 CFR 16.57 (Letters 39a, 41a). As we have seen, the regulation is overbroad and contrary to the venue section of the act 552a(g)(5). And Mr. Hibsher promptly presents an affirmative defense of improper venue in the Answer (Second Defense 11a).

As to the administrative review regulations at 28 CFR 16.47, these seem to be valid regulations providing useful, optional, parallel procedures for obtaining records, but, when applied on a compulsory basis, as was done in this case, they become overbroad in application and violate the express statutory language of 552a(g)(1) and give rise to totalitarian overtones contrary to the fifth amendment guarantees of due process.

CONCLUSION

As it is said in the performing arts:

"Well, there are people who eat the earth and eat all the people on it like in the Bible with the locusts. Then there are people who stand around and watch them eat it. Sometimes I think it ain't right to stand and watch them do it."

For all of the foregoing reasons the judgment of the court below should be reversed.

Respectfully submitted,

ROBERT V. RAFTER,
Attorney for appellant.

TEXT OF STATUTES AND REGULATIONS

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§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4) (A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency

determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provision of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6) (A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a) (6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a) (4) (F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the

exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsections (a) (4) (E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency. (As amended Pub. L. 93-502, §§ 1-3, Nov. 21, 1974, 88 Stat. 1561-1564.)

AMENDMENTS

1974—Subsec. (a) (2). Pub. L. 93-502, § 1(a), substituted provisions relating to maintenance and availability of current indexes, for provisions relating to maintenance and availability of a current index, and added provisions relating to publication and distribution of copies of indexes or supplements thereto.

Subsec. (a) (3). Pub. L. 93-502, § 1(b) (1), substituted provisions requiring requests to reasonably describe records for provisions requiring requests, for identifiable records, and struck out provisions setting forth procedures to enjoin agencies from withholding the requested records and ordering their production.

Subsec. (a) (4). Pub. L. 93-502, § 1(b) (2), added subsec. (a) (4). Former subsec. (a) (4) redesignated (a) (5).

Subsec. (a) (5). Pub. L. 93-502, § 1(b) (2), redesignated former subsec. (a) (4) as (a) (5).

Subsec. (a) (6). Pub. L. 93-502, § 1(c), added subsec. (a) (6).

Subsec. (b) (1). Pub. L. 93-502, § 2(a), designated existing provisions as cl. (A), and, as so designated, substituted "authorized under criteria established by an" for "required by", and added cl. (B).

Subsec. (b) (7). Pub. L. 93-502, § 2(b), substituted provisions relating to exemption for investigatory records compiled for law enforcement purposes, for provisions relating to exemption for investigatory files compiled for law enforcement purposes.

Subsec. (b). Pub. L. 93-502, § 2(c), added provision following par. (9) relating to availability of segregable portion of records.

Subsecs. (d), (e). Pub. L. 93-502, § 3, added subsecs. (d) and (e).

EFFECTIVE DATE OF 1974 AMENDMENT

Section 4 of Pub. L. 93-502 provided that: "The amendments made by this Act [amending this section] shall take effect on the ninetieth day beginning after the date of enactment of this Act [Nov. 21, 1974]."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 551, 552a of this title; title 2 sections 472, 501, 502; title 15 sections 78m, 78w, 78x, 78ggg, 786, 773, 796, 1193, 1262, 1418, 2005, 2055, 2217; title 16 sections 1100b-5, 1402; title 19 section 160; title 31 section 1052; title 33 section 1513; title 39 section 410; title 42 sections 2936d, 4332, 5916, 6272, 6273, 6274, 6346; title 45 sections 546, 715; title 46 section 1463; title 49 sections 1357, 1805, 1806, 1905; title 50 App. sections 463, 2158, 2158a.

§ 552a. Records maintained on individuals.

(a) Definitions.

For purposes of this section—

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13; and

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected.

(b) Conditions of disclosure.

No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a) (7) of this section and described under subsection (e) (4) (D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives of the United States as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Administrator of General Services or his designee to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the General Accounting Office; or

(11) pursuant to the order of a court of competent jurisdiction.

(c) Accounting of certain disclosures.

Each agency, with respect to each system of records under its control shall—

(1) except for disclosures made under subsections (b)(1) or (b)(2) of this section, keep an accurate accounting of—

(A) the date, nature, and purpose of each disclosure of a record to any person or to another agency made under subsection (b) of this section; and

(B) the name and address of the person or agency to whom the disclosure is made;

(2) retain the accounting made under paragraph (1) of this subsection for at least five years or the life of the record, whichever is longer, after the disclosure for which the accounting is made;

(3) except for disclosures made under subsection (b)(7) of this section, make the accounting made under paragraph (1) of this subsection available to the individual named in the record at his request; and

(4) inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of this section of any record that has been disclosed to the person or agency if an accounting of the disclosure was made.

(d) Access to records.

Each agency that maintains a system of records shall—

(1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;

(2) permit the individual to request amendment of a record pertaining to him and—

(A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date of receipt of such request, acknowledge in writing such receipt; and

(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

(3) permit the individual who disagrees with the refusal of the agency to amend his record to request a review of such refusal, and not later than 30 days (excluding Saturdays, Sundays, and legal public holidays) from the date on which the individual requests such review, complete such review and make a final determination unless, for good cause shown, the head of the agency extends such 30-day period; and if, after his review, the reviewing official also refuses to amend the record in accordance with the request, permit the individual to file with the agency a concise statement setting forth the reasons for his disagreement with the refusal of the agency, and notify the individual of the provisions for judicial review of the reviewing official's determination under subsection (g)(1)(A) of this section;

(4) in any disclosure, containing information about which the individual has filed a statement of disagreement, occurring after the filing of the statement under paragraph (3) of this subsection, clearly note any portion of the record which is disputed and provide copies of the statement and, if the agency deems it appropriate, copies of a concise statement of the reasons of the agency for not making the amendments requested, to persons or other agencies to whom the disputed record has been disclosed; and

(5) nothing in this section shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(e) Agency requirements.

Each agency that maintains a system of records shall—

(1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President;

(2) collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs;

(3) inform each individual whom it asks to supply information, on the form which it uses to collect the information or on a separate form that can be retained by the individual—

(A) the authority (whether granted by statute, or by executive order of the President) which authorizes the solicitation of the information and whether disclosure of such information is mandatory or voluntary;

(B) the principal purpose or purposes for which the information is intended to be used;
(C) the routine uses which may be made of the information, as published pursuant to paragraph (4)(D) of this subsection; and
(D) the effects on him, if any, of not providing all or any part of the requested information;
(4) subject to the provisions of paragraph (11) of this subsection, publish in the Federal Register at least annually a notice of the existence and character of the system of records, which notice shall include—

- (A) the name and location of the system;
- (B) the categories of individuals on whom records are maintained in the system;
- (C) the categories of records maintained in the system;
- (D) each routine use of the records contained in the system, including the categories of users and the purpose of such use;
- (E) the policies and practices of the agency regarding storage, retrievability, access controls, retention, and disposal of the records;
- (F) the title and business address of the agency official who is responsible for the system of records;
- (G) the agency procedures whereby an individual can be notified at his request if the system of records contains a record pertaining to him;
- (H) the agency procedures whereby an individual can be notified at his request how he can gain access to any record pertaining to him contained in the system of records, and how he can contest its content; and
- (I) the categories of sources of records in the system;

(5) maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination;

(6) prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to subsection (b)(2) of this section, make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes;

(7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

(8) make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record;

(9) establish rules of conduct for persons involved in the design, development, operation, or maintenance of any system of records, or in maintaining any record, and instruct each such person with respect to such rules and the requirements of

this section, including any other rules and procedures adopted pursuant to this section and the penalties for noncompliance;

(10) establish appropriate administrative, technical, and physical safeguards to insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained; and

(11) at least 30 days prior to publication of information under paragraph (4)(D) of this subsection, publish in the Federal Register notice of any new use or intended use of the information in the system, and provide an opportunity for interested persons to submit written data, views, or arguments to the agency.

(f) Agency rules.

In order to carry out the provisions of this section, each agency that maintains a system of records shall promulgate rules, in accordance with the requirements (including general notice) of section 553 of this title, which shall—

(1) establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him;

(2) define reasonable times, places, and requirements for identifying an individual who requests his record or information pertaining to him before the agency shall make the record or information available to the individual;

(3) establish procedures for the disclosure to an individual upon his request of his record or information pertaining to him, including special procedure, if deemed necessary, for the disclosure to an individual of medical records, including psychological records pertaining to him;

(4) establish procedures for reviewing a request from an individual concerning the amendment of any record or information pertaining to the individual, for making a determination on the request, for an appeal within the agency of an initial adverse agency determination, and for whatever additional means may be necessary for each individual to be able to exercise fully his rights under this section; and

(5) establish fees to be charged, if any, to any individual for making copies of his record, excluding the cost of any search for and review of the record.

The Office of the Federal Register shall annually compile and publish the rules promulgated under this subsection and agency notices published under subsection (e)(4) of this section in a form available to the public at low cost.

(g)(1) Civil remedies.

Whenever any agency

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d) (1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2) (A) In any suit brought under the provisions of subsection (g) (1) (A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3) (A) In any suit brought under the provisions of subsection (g) (1) (B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g) (1) (C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two

years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

(h) Rights of legal guardians.

For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.

(i) (1) Criminal penalties.

Any officer or employee of an agency, who by virtue of his employment or official position, has possession of, or access to, agency records which contain individually identifiable information the disclosure of which is prohibited by this section or by rules or regulations established thereunder, and who knowing that disclosure of the specific material is so prohibited, willfully discloses the material in any manner to any person or agency not entitled to receive it, shall be guilty of a misdemeanor and fined not more than \$5,000.

(2) Any officer or employee of any agency who willfully maintains a system of records without meeting the notice requirements of subsection (e) (4) of this section shall be guilty of a misdemeanor and fined not more than \$5,000.

(3) Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than \$5,000.

(j) General exemptions.

The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b) (1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c) (1) and (2), (e) (4) (A) through (F), (e) (6), (7), (9), (10), and (11), and (1) if the system of records is—

(1) maintained by the Central Intelligence Agency; or

(2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and

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whether the employee was acting within the scope of his office or employment with the Federal Government, at the time of the incident out of which the suit arose, to the United States Attorney for the district embracing the place wherein the civil action or proceeding is brought, with a copy of the report to the Chief of the Torts Section, Civil Division, Department of Justice, at the earliest possible date, or within such time as shall be fixed by the United States Attorney upon request.

§ 15.3 Removal and defense of suits.

Authority is hereby delegated to the several United States Attorneys to make the certification provided for in 28 U.S.C. 2679(d), 38 U.S.C. 4116(c), and 42 U.S.C. 233(c) with respect to civil actions or proceedings brought against Federal employees in their respective districts. Such a certification may be withdrawn if a further evaluation of the relevant facts or the consideration of new or additional evidence calls for such action. The making, withholding, or withdrawing of certifications, and the removal and defense of, or the refusal to remove and defend, such civil actions or proceedings by the United States Attorneys shall be subject to the instructions and supervision of the Assistant Attorney General in charge of the Civil Division in accordance with section 507 of title 28 of the United States Code.

[Order No. 254-61, 26 FR 11420, Dec. 2, 1961, as amended by Order No. 591-75, 40 FR 4910, Feb. 3, 1975]

PART 16—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

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- 16.96 Exemption of Federal Bureau of Investigation Systems—Limited access.
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- 16.98 Exemption of Drug Enforcement Administration Systems.
- 16.99 Exemption of Immigration and Naturalization Service System—Limited access.
- 16.100 Exemption of Law Enforcement Assistance Administration System—Limited access.
- 16.101 Exemption of U.S. Marshals Service Systems—Limited access, as indicated.

AUTHORITY: 28 U.S.C. 509, 510; 5 U.S.C. 301, 552; 31 U.S.C. 483a unless otherwise noted.

SOURCE: Order No. 502-73, 38 F.R. 4391, Feb. 14, 1973, unless otherwise noted.

Subpart A—Production or Disclosure Under 5 U.S.C. 552(a)

§ 16.1 Purpose and scope.

(a) This subpart contains the regulations of the Department of Justice implementing 5 U.S.C. 552. The regulations of this subpart provide information concerning the procedures by which records may be obtained from all divisions within the Department of Justice. Official records of the Department of Justice made available pursuant to the requirements of 5 U.S.C. 552 shall be furnished to members of the public as prescribed by this subpart. Officers and employees of the Department may continue to furnish

to the public, informally and without compliance with the procedures prescribed herein, information and records which prior to enactment of 5 U.S.C. 552 were furnished customarily in the regular performance of their duties. Persons seeking information or records of the Department of Justice may find it useful to consult with the Department's Office of Public Information before invoking the formal procedures set out below. To the extent permitted by other laws, the Department also will make available records which it is authorized to withhold under 5 U.S.C. 552 whenever it determines that such disclosure is in the public interest.

(b) The Attorney General's Memorandum on the Public Information section of the Administrative Procedure Act, which was published in June 1967 and is available from the Superintendent of Documents, may be consulted in considering questions arising under 5 U.S.C. 552. The Office of Legal Counsel after appropriate coordination is authorized from time to time to undertake training activities for Department personnel to maintain and improve the quality of administration under 5 U.S.C. 552.

§ 16.2 Public reference facilities.

Each office listed below will maintain in a public reading room or public reading area, the materials relating to that office which are required by 5 U.S.C. 552(a)(2) and 552(a)(4) to be made available for public inspection and copying:

U.S. Attorneys and U.S. Marshals—at the principal offices of the U.S. Attorneys listed in the U.S. Government Organization Manual;

Bureau of Prisons and U.S. Board of Parole—at the principal office of each of those agencies at 101 Indiana Avenue NW, Washington, D.C. 20537;

Community Relations Service—at 550 11th Street NW., Washington, D.C. 20530;

Internal Security Section, Criminal Division (for registrations of foreign agents and others pursuant to 28 CFR Part 5, 10, 11, and 12)—at Room 458, Federal Triangle Building, 315 Ninth Street, NW., Washington, DC 20530;

Board of Immigration Appeals—at Room 1138, 521 12th Street NW., Washington, DC 20530;

Immigration and Naturalization Service—at 8 CFR 103.9;

Law Enforcement Assistance Administration—633 Indiana Avenue NW, Washington, DC 20530, and Regional Office as listed in the U.S. Government Organization Manual.

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(b) *Fees charged.* Fees may only be assessed for actual copies of materials furnished pursuant to the Privacy Act in accordance with the following schedule:

(1) For copies of documents (maximum of 10 copies will be supplied), \$0.10 per page:

(2) For computer material charges:

(i) One-part paper per 1,000 pages---	\$11.00
(ii) Two-part paper per 1,000 pages---	22.80
(iii) Three-part paper per 1,000 pages---	36.17
(iv) Four-part paper per 1,000 pages---	48.32
(v) Five-part paper per 1,000 pages---	63.97
(vi) Stock Hollerith cards per 1,000---	1.98
(vii) Magnetic tape per reel-----	10.75
(viii) Disk pack, each-----	775.00

(3) For tape recordings and other audio records:

(i) 45 minute cassette-----	\$0.56
(ii) 60 minute cassette-----	.60
(iii) 90 minute cassette-----	.77

(4) For materials other than the common ones described in paragraphs (b) (1), (2) and (3) of this section, the direct costs of such materials to the government may be charged, but only if the requester has been notified of such cost before it is incurred.

(c) *Notice of anticipated charges.* Where it is anticipated that access fees chargeable under this section will amount to more than \$25, and the requester has not indicated in advance his willingness to pay fees as high as are anticipated, the requester shall be notified of the amount of the anticipated fees before copies are made. The notification shall offer the requester the opportunity to confer with Department personnel with the object of reformulating the request so as to meet his needs at lower cost.

(d) *Form of payment.* Payment should be made by check or money order payable to the Department of Justice. No employee of the Department of Justice is authorized to accept payment of fees in cash.

(e) *Advance deposit.* Where the anticipated fee chargeable under this section exceeds \$25, an advance deposit of part or all of the anticipated fee may be required.

§ 16.47 Appeals from denials of access.

An individual who has been denied access to records concerning him may appeal that decision to the Deputy Attorney General by filing a written appeal within 30 working days of the receipt of the denial. If the denial of access was made by a responsible person in the Of-

fice of the Deputy Attorney General, the appeal shall be to the Attorney General. The appeal shall be marked on its face and on the face of the envelope "Privacy Appeal—Denial of Access," and shall be addressed to the Office of the Deputy Attorney General, U.S. Department of Justice, Washington, D.C. 20530, or, if an appeal from a denial by the Deputy Attorney General, to the Assistant Attorney General, Office of Legal Counsel, at the same address. Appeals shall be determined in thirty working days unless the appropriate official, by notice to the individual, extends that period for an additional thirty working days because of the volume of records requested, the scattered location of records, the need to consult other agencies, or the difficulty of the legal issues involved, or other administrative difficulty.

§ 16.48 Requests for correction of records.

(a) *How Made.* Unless a record is exempted from correction, an individual may request amendment or correction of a record concerning him by addressing his request to the person responsible for the system in which the record is maintained either in person or by mail. The request must indicate the particular record involved, the nature of the correction sought, and the justification for the correction or amendment. Requests made by mail should be addressed to the person specified in the Notice of Systems of Records published by the General Services Administration and shall be clearly marked on the request and on the envelope "Privacy Correction Request." Where the individual believes that the same record appears in more than one system, he should address his request to each person responsible for a system of records which may contain the record he seeks to correct.

(b) *Initial determination.* Within 10 working days of the receipt of the request, the appropriate Department official shall advise the individual that his request has been received. If the record is to be amended or corrected, the system manager may so advise the individual but if correction is refused, in whole or in part, it must be done by the head of the component in which the record is located or his delegate. If a correction is to be made, the individual shall be advised of his right to obtain a copy of the corrected record upon request. If a correction or amendment is refused, in

whole or in part, the individual shall be so advised, shall be given reasons for the refusal, and shall be advised of his right to appeal the refusal to the Deputy Attorney General in accordance with the procedures set forth in this section.

(c) *Appeals.* A refusal, in whole or in part, to amend or correct a record may be appealed to the Deputy Attorney General within 30 days of the receipt of notice of the refusal. If the refusal to correct was made by the Office of the Deputy Attorney General, the appeal shall be to the Attorney General. Appeals shall be in writing, shall set forth the specific item of information sought to be corrected, and the individual's documentation justifying the correction. Appeals shall be addressed to the Office of the Deputy Attorney General, U.S. Department of Justice, Washington, D.C. 20530 or, if an appeal from a denial by the Deputy Attorney General, to the Assistant Attorney General, Office of Legal Counsel, at the same address. They shall be clearly marked on the appeal and on the envelope, "Privacy Correction Appeal." The appeal shall be decided within 30 working days unless the appropriate official shall extend the time for an additional 30 working days because of the need to obtain additional information, the volume of records involved, or the complexity of the issue, or other administrative difficulty. The requester shall be advised in advance of any such extension and shall be given the reasons therefor.

(d) *Appeal determinations.* If the Deputy Attorney General or Attorney General determines that an amendment or correction is not warranted on the facts, he shall advise the individual of his refusal to authorize correction or amendment of the record, in whole or in part, and shall advise the individual of his right to provide for the record a "Statement of Disagreement." The individual shall be advised also of his right to judicial review pursuant to the Privacy Act of 1974.

(e) *Statements of disagreement.* Statements of Disagreement may be furnished by the individual within 30 working days of the date of receipt of the notice of refusal of the Deputy Attorney General or Attorney General to authorize correction. They shall be addressed to the Office of the Deputy Attorney General, U.S. Department of Justice, Washington, D.C. 20530. Statements may not exceed one typed page per fact

disputed. Statements exceeding this limit will be returned to the requester for condensation. Upon receipt of a statement of disagreement in accordance with this section, the Deputy Attorney General shall take steps to insure that the statement is included in the system or systems of records in which the disputed item is maintained and that the original record is so marked as to indicate that there is a statement of disagreement and where, within the system of records, that statement may be found.

(f) *Notices of correction or disagreement.* When a record has been corrected the system manager shall, within thirty working days thereof, advise all prior recipients of the record whose identity can be determined pursuant to the accounting required by the Privacy Act or any other accounting previously made, of the correction. Any dissemination of a record after the filing of a statement of disagreement shall be accompanied by a copy of that statement. Any statement of the agency giving reasons for refusing to correct shall be included in the file.

[Order No. 627-75, 40 FR 506-2, Oct. 30, 1975; 40 FR 52007, Nov. 7, 1975]

§ 16.49 Records not subject to correction.

The following records are not subject to correction or amendment by individuals:

- (a) Transcripts or written statements made under oath;
- (b) Transcripts of Grand Jury Proceedings, judicial or quasi-judicial proceedings which form the official record of those proceedings;
- (c) Pre-sentence reports comprising the property of the courts but maintained in agency files; and
- (d) Records duly exempted from correction by notice published in the FEDERAL REGISTER.

§ 16.50 Accounting for disclosures.

(a) As soon as possible, but not later than September 27, 1975, each system manager, with the approval of the head of his component, shall establish a system of accounting for all disclosures of records, either orally or in writing, made outside the Department of Justice. Accounting procedures may be established in the least expensive and most convenient form that will permit the system manager to advise individuals, promptly upon request, of the persons or agen-

§ 16.57 Relationship of Privacy Act and the Freedom of Information Act.

(a) Issuance of this section and actions considered or taken pursuant hereto are not to be deemed a waiver of the Government's position that the materials in question are subject to all of the exemptions contained in the Privacy Act. By providing for exemptions in the Act, Congress conferred upon each agency the option, at the discretion of the agency, to grant or deny access to exempt materials unless prohibited from doing so by any other provision of law. Releases

of records under this section, beyond those mandated by the Privacy Act, are at the sole discretion of the Deputy Attorney General and of those persons to whom authority hereunder may be delegated. Authority to effect such discretionary releases of records and to deny requests for those records as an initial matter is hereby delegated to the appropriate system managers as per the Notices of Systems of Records published in 40 FEDERAL REGISTER 167, pages 33703-38801 (August 27, 1975).

(b) Any request by an individual for information pertaining to himself shall be processed solely pursuant to this Subpart D. To the extent that the individual seeks access to records from systems of records which have been exempted from the provisions of the Privacy Act, the individual shall receive, in addition to access to those records he is entitled to receive under the Privacy Act and as a matter of discretion as set forth in paragraph (a), access to all records within the scope of his request to which he would have been entitled under the Freedom of Information Act, 5 U.S.C. 552, but for the enactment of the Privacy Act and the exemption of the pertinent systems of records pursuant thereto. Only fees set forth in § 16.46 may be charged a requester as to any records to which access is granted pursuant to the provisions of this subsection.

(c) When an individual requests access to records pertaining to criminal, national security or civil investigative activities of the Federal Bureau of Investigation which are contained in systems of records exempted under provisions of the Privacy Act, such requests shall be processed as follows:

(1) Where the investigative activities involved have been reported to F.B.I. Headquarters, records maintained in the F.B.I.'s Central files will be processed; and,

(2) Where the investigative activities involved have not been reported to F.B.I. Headquarters, records maintained in files of the Field Office identified by the requester will be processed.

Dated: October 22, 1975.

EDWARD H. LEVI,
Attorney General.

CERTIFICATION OF SERVICE

I hereby certify that I am over the age of eighteen and reside in the State of Connecticut. I certify that I am not a party to the within action and that on the 9th day of January 1978 I served the attorney for the appellee with a copy of the Joint Appendix and a copy of the Brief for the Appellant by depositing a copy of each properly addressed in a U.S. Post Office maintained in the State of Connecticut.



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